



May 15, 2007

**OPINION ON REHEARING- NOT FOR PUBLICATION**

**BARNES, Judge**

Hunt Paving Company, Inc. (“Hunt”) petitions for rehearing following our decision in United Consulting Engineers, Inc. v. Hunt Paving Company, Inc., No. 49A02-0511-CV-1089 (Ind. Ct. App. Dec. 20, 2006). Hunt does not disagree with our conclusion therein that a construction contract between it and the City of Indianapolis requires Hunt to indemnify United Consulting Engineers (“UCE”) for damages paid by UCE to Hunt’s injured employee, Michelle Hartwell, if there is any evidence Hunt’s negligence was at least partially responsible for her injuries. Hunt, however, takes issue with our following statements: “There is no disputed issue of material fact here that the collapse of the trench, causing injury to Hartwell, was at least partially Hunt’s fault. . . . No issue of material fact exists on the question of whether Hunt was at least partially at fault for Hartwell’s injuries.” Slip op. pp. 17-18. Hunt claims there is, in fact, disputed evidence as to whether its negligence was a partial cause of the trench collapse. Therefore, it requests that we reverse our original decision to the extent we held UCE was entitled as a matter of law to indemnification from Hunt and remanded simply for a calculation of the monetary extent of Hunt’s indemnification obligation. Instead, Hunt argues that further proceedings, namely a trial, is required to determine whether it was at all at fault for Hartwell’s injuries before it can be determined whether it must indemnify

UCE.

In its original briefing, Hunt chose to focus its argument entirely upon interpretation of the contract between it and the City of Indianapolis and to argue that under any set of circumstances, UCE was not entitled to indemnity with respect to Hartwell's damages. Also, as we noted in our original opinion, Hunt chose to ignore our holding in GKN Co. v. Starnes Trucking, Inc., 798 N.E.2d 548, 552 (Ind. Ct. App. 2003) and to not cite or discuss it in any way, despite UCE's heavy reliance upon that case. GKN, which interpreted an indemnity provision nearly identical to the one in this case, clearly stated that in order for the provision to be effective, there would have to be a finding that the would-be indemnitor was at least partially at fault for the injury. GKN, 798 N.E.2d at 554.

Additionally, UCE directed us to evidence, in the form of the expert opinion testimony of Frank Burg, that Hunt was partially at fault for the trench's collapse and that OSHA had cited only Hunt for violation of safety regulations in connection with the collapse. Hunt directed us to no contrary evidence in the record. Now, however, Hunt directs us to the deposition testimony of Ray Elfritz, Hunt's foreman at the time and place of the accident. Elfritz stated that he had inspected the trench before the collapse and believed the walls of the trench to be stable and solid, and that additional safety measures Burg had said should have been employed were not required. In other words, having admittedly lost regarding the proper interpretation of the indemnity provision, Hunt now wants to switch gears and attempt to refute Burg's testimony (and the OSHA determination) and to argue that it was in no way responsible or negligent with respect to

the trench's collapse and to avoid application of the indemnity provision in that way. However, "A petitioner may seek rehearing only on points raised in the original brief." Griffin v. State, 763 N.E.2d 450, 451 (Ind. 2002). A rehearing petition is confined to those issues that were properly presented in the initial appeal and that were overlooked or improperly decided. Holmes v. ACandS, Inc., 711 N.E.2d 1289, 1291 (Ind. Ct. App. 1999), trans. denied. This point, regarding whether Hunt was at all at fault for the trench's collapse and Hartwell's injuries, was not raised in Hunt's original brief even though UCE referred to such evidence in its brief. As such, Hunt cannot make this argument for the first time in a petition for rehearing. Thus, although we grant rehearing, we affirm our original decision in all respects.

ROBB, J., concurs.

SULLIVAN, J., subject to the comments set forth in my December 20, 2006 separate concurrence, I would deny the Petition for Rehearing filed by Hunt Paving Co., Inc.